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United States Court of Appeals, Sixth Circuit.

Sandra FARLEY, Plaintiff--Appellee,
v.
David FARLEY; Brenna Grissom; John Doe; State of Tennessee, Department of Human Services, Defendants,
Jane BROCK, Defendant--Appellant.

Nos. 98-6114, 98-6115.

July 19, 2000.

On Appeal from the United States District Court for the Middle District of Tennessee.

Before RYAN and MOORE, and GIBSON, [FN*] Circuit Judges.

FN* The Honorable John R. Gibson, Senior Circuit Judge of the United States Court of Appeals for the Eighth Circuit, sitting by designation.

GIBSON, Senior Circuit Judge.

****1** Jane Brock and Brenna Grissom appeal from the district court's adverse disposition of their separate motions for summary judgment as to their claimed absolute and qualified immunity in Sandra Farley's suit against them under 42 U.S.C. § 1983 (1994) for depriving her of her children's custody in violation of her constitutional rights. In addition, Brock appeals the district court's adverse ruling on her motion for summary judgment as to her claimed absence of direct or supervisory liability in the present action. David Farley, Ms. Farley's ex-husband, is also a defendant to this suit, but he is not a party to this appeal. We affirm the order of the district court. [FN1]

FN1. The Honorable Robert L. Echols, United States District Court for the Middle District of Tennessee.

We state the facts, which are contested on several grounds, in the light most favorable to the non-moving party, resolving all conflicts in Ms. Farley's favor. *See National Enters., Inc. v. Smith,* 114 F.3d 561, 563 (6th Cir.1997).

On March 15, 1991, Ms. Farley was awarded primary custody of Christina and David, Jr., biological children from her prior marriage to Mr. Farley. In January 1995, she began dating Hugh Curtiss, to whom she is now married. Curtiss adopted Ms. Farley's youngest child, Dustin, her child from a relationship following her marriage to Mr. Farley.

Prior to January 1995, the Tennessee Department of Human Services had received ten referrals regarding problems with Ms. Farley's parenting. More than half of these referrals were "indicated," meaning there was substantial evidence of abuse or neglect. On January 9, 1995, the Department obtained information that Curtiss, then Ms. Farley's live-in boyfriend, had bruised Christina's buttocks with a belt and had held David, Jr.'s head underwater in a bathtub. That same day, Grissom, a social counselor with the Department, interviewed Christina and David, Jr. and took pictures of Christina's buttocks. Ms. Farley has admitted that Curtiss whipped the children on several occasions, using his hand or a belt. However, Grissom never asked Christina how she received the bruises, which Ms. Farley believes are a result of falling while using her rollerblades. David, Jr. expressly denied he had any bruises from being whipped by Hugh and stated that such whippings did not hurt. After reviewing Ms. Farley's files at the Department and contacting Christina's guidance counselor, Grissom determined that a relative placement was necessary to protect the children from harm.

On January 23, 1995, Grissom went to Ms. Farley and Curtiss's home and told them about the allegations of abuse. At that time, Ms. Farley signed a voluntary plan of action, which required Curtiss to be kept away from the children and gave the children the option of staying with their father, Mr. Farley. Mr. Farley subsequently took physical custody of Christina and David, Jr., while Dustin remained with Ms. Farley. At all times relevant to this appeal, however, legal custody of Ms. Farley's three children has remained with her. Ms. Farley maintains Grissom told her that her children would be returned to her by February 3, 1995.

****2** The day after the children left Ms. Farley's home, Grissom met with Ms. Farley and Curtiss about the reasons for the Department's involvement in their family affairs. Grissom presented Ms. Farley with an amended safety plan with additional requirements. The amended plan required Ms. Farley to receive counseling and attend parenting and sobriety classes. Although Ms. Farley refused to sign the document, she began making an effort to comply with its mandates, because Grissom told her that such would be required before her children would be returned to her.

Ms. Farley tried several times to regain custody of her children before they were ultimately returned to her. On February 28, 1995, Ms. Farley called Brock, Grissom's supervisor, and asked that her children be returned to her; however, Brock simply informed Ms. Farley that Grissom had sixty days to conduct her investigation of Ms. Farley's case. Ms. Farley again tried to regain physical custody of Christina and David, Jr. on Friday, March 31, 1995, when she had her first post-separation visit with them at the Department office. Her efforts again went unrewarded when Grissom claimed to have obtained an "oral court order" from a juvenile court judge temporarily preventing Ms. Farley from taking the children. Ms. Farley continued her attempts to regain physical custody of Christina and David. Jr. when she and Curtiss met with Brock at the Department office the following Monday, April 3, 1995. At this meeting, Brock verbally attacked them, defended Grissom's actions, and threatened to remove Dustin from their custody if they hired an attorney. Ten days later, on April 13, 1995, Ms. Farley asked a deputy sheriff with the Putnam County Sheriff's Department to assist her in recovering her children; however, no one would help her because Grissom had informed the Sheriff's Department that to her knowledge Mr. Farley had temporary custody of Christina and David, Jr.

Ms. Farley's children were finally returned to her on April 24, 1995, when an assistant district attorney advised Mr. Farley that if he did not return the children to Ms. Farley, a custodial interference warrant would be issued. Ms. Farley then commenced the present suit against Mr. Farley, Brock, and Grissom for violating her constitutional rights of procedural and substantive due process under 42 U.S.C. § 1983 (1994). Grissom moved for summary judgment based on absolute and qualified immunity and Brock on lack of direct or supervisory liability under § 1983 as well as both absolute and qualified immunity. The district court denied these motions.

I.

We review a denial of summary judgment de novo, viewing the evidence in the light most favorable to the non-moving party. *See* *Hollister v. Dayton-Hudson Corp.*, 188 F.3d 414, 417 (6th Cir.1999). Summary judgment will be granted if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c). The non-moving party must then "set forth specific facts showing that there is a genuine issue for trial." Fed.R.Civ.P. 56(e); *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986); *Hollins v. Atlantic Co.*, 1999 WL 615487 (6th Cir.1999). "As to materiality ... [o]nly disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986); *Moore v. Philip Morris Cos., Inc.*, 8 F.3d 335, 343 (6th Cir.1993).

II.

****3** Brock argues that she was not a direct participant in Ms. Farley's case, and that she did not engage in conduct sufficient to make her liable as a supervisor in Ms. Farley's § 1983 action against her. We need not consider whether Brock engaged in conduct sufficient to make her liable under § 1983 as a supervisor, as there is sufficient evidence from which a reasonable jury could find her directly liable under the statute. We note several pieces of evidence that would support such a conclusion: (1) Grissom testified that Brock authorized the children's removal from Ms. Farley's home; (2) Grissom further testified that Brock told her that Ms. Farley's children were not to be returned to her unless she agreed to keep Curtiss away from them; (3) Brock admitted in an answer to an interrogatory that Ms. Farley called Brock in late February 1995 to ask for her children back and further admitted in her response to Plaintiff's First Set of Requests for Admissions that she simply told Ms. Farley that Grissom had sixty days to complete her investigation; and (4) Ms. Farley and Curtiss swore by affidavit that during their April 3, 1995 meeting with Brock, Brock made unfounded accusations about them, stood behind Grissom's actions, and informed them that Dustin would be taken from them if they hired an attorney. In light of this evidence of Brock's direct involvement in the alleged deprivation of Ms. Farley's constitutional rights, we affirm the district court's denial of summary judgment as to both Brock's denial that she was a direct participant in Ms. Farley's case and her claimed innocence as a supervisor of Grissom's management of that case.

III.

Grissom and Brock next claim they are absolutely immune from suit for their actions in accordance with enforcing the oral court order Grissom purportedly obtained on March 31, 1995. They are certainly not absolutely immune for their conduct before that date, as such conduct was purely investigative in nature. *See* Achterhof v. Selvaggio, 886 F.2d 826 (6th Cir.1989) (social workers' deciding to "open a case," place plaintiff's name on a child abuse registry, and later failing to remove plaintiff's name from the registry was investigatory in nature, not entitling the workers to absolute prosecutorial immunity). And as to conduct occurring after Grissom claims to have received the oral court order, there is evidence to suggest no such order was ever granted, which is an issue for a jury to decide. Because the existence of appellants' absolute immunity depends upon whether such an order was obtained, we affirm the district court's denial of summary judgment based on such immunity. *See* *Bush v. Rauch,* 38 F.3d 842, 847 (6th Cir.1994) ("Quasi-judicial immunity extends to those persons performing tasks so integral or intertwined with the judicial process that these persons are considered an arm of the judicial officer who is immune.").

IV.

Appellants' best argument is that they are qualifiedly immune from the charges against them. With regard to appealability of denials of summary judgment on qualified immunity grounds, the Supreme Court in *Johnson v. Jones,* 515 U.S. 304, 317 (1995) (internal quotations omitted), held that "immunity appeals interfere less with the final judgment rule if they are limited to cases presenting neat abstract issues of law." The Court later explained in *Behrens v. Pelletier,* 516 U.S. 299, 313 (1996), that "*Johnson* permits [an appellant] to claim on appeal that all of the conduct which the District Court deemed sufficiently supported for purposes of summary judgment met the *Harlow* standard of 'objective legal reasonableness." ' Therefore, we must examine the facts as recited by the district court, and determine as a matter of law whether those facts would support appellants' defense of qualified immunity. Because those facts would support a decision denying appellants qualified immunity, we must uphold the district court's denial of summary judgment against appellants on this issue as well.

****4** Qualified immunity is given to "government officials performing discretionary functions ... insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald,* 457 U.S. 800, 818 (1982). There is a private aspect to family life, which is immune from state interference and which is afforded protection by both the procedural and substantive due process clauses. *See Smith v. Organization of Foster Families,* 431 U.S. 816, 842 (1977). We have recognized that parents have a liberty interest in the custody of their children. *See* *Hooks v. Hooks,* 771 F.2d 935, 941 (6th Cir.1985). However, we are cognizant of the Hobson's choice that social workers face when determining whether to interfere with the custody rights of parents: "If they err in interrupting parental custody, they may be accused of infringing the parents' constitutional rights. If they err in not removing the child, they risk injury to the child and may be accused of infringing the child's rights." *Van Emrik v. Chemung County Dep't of Soc. Servs.,* 911 F.2d 863, 866 (2d Cir.1990). Qualified immunity is a shield to protect social workers who must make this difficult decision if their actions are objectively reasonable. *See id.*

A.

Based on the facts as recited by the district court, we conclude that the appellants do not deserve the protection of qualified immunity with respect to Ms.

Farley's procedural due process claim.

When ruling on a claim of qualified immunity, a court "must first determine whether the plaintiff has alleged the deprivation of an actual constitutional right at all, and if so, proceed to determine whether that right was clearly established at the time of the alleged violation." Conn v. Gabbert, 526 U.S. 286, 290 (1999). Therefore, we must first determine whether Ms. Farley's recognized liberty interest in the custody of her children has received adequate due process protection. *See* Morrissey v. Brewer, 408 U.S. 471, 481 (1972); Doe v. Staples, 706 F.2d 985, 988 (6th Cir.1983). Three factors guide such determination: "First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirements would entail." Mathews v. Eldridge, 424 U.S. 319, 335 (1976). We have long recognized that an analysis of these factors clearly leads to the conclusion that "notice and an opportunity to be heard are necessary before parental rights can be terminated." Anh v. Levi, 586 F.2d 625, 632 (6th Cir.1978). The only process Ms. Farley received, however, was the Department's notice of the allegations against Curtiss. At no time was she afforded a hearing to contest her children's placement with their father. Based on the facts as recited by the district court, her consent to such placement was not voluntary during the entire time period involved, which would invoke procedural due process protections which she was not afforded.

****5** Next, we must determine whether defendants are entitled to qualified immunity by asking whether appellants' violated clearly established procedural due process rights of which a reasonable person would have known. Such protections have been definitively established in the decisions of the Supreme Court and this circuit, and the trial court did not err in denying appellants' summary judgment motion on their defense of qualified immunity. *See* Ohio Civil Serv. Employees Assoc. v. Seiter, 858 F.2d 1171, 1177 (6th Cir.1988).

Our decisions have held that notice and an opportunity to be heard is not all the process due when parents' custody rights are threatened. In Doe v. Staples, 706 F.2d at 990-91, a case involving the removal of children from parents' physical custody where a state has temporary legal custody, we held due process to require five things:

1) The parents be given notice prior to the removal of the child ... stating the reasons for the removal;
2) The parents be given a full opportunity at the hearing to present witnesses and evidence on their behalf;
3) The parents may have a retained attorney at the hearing;
4) The hearing must be conducted by a neutral and detached hearing officer; and
5) The hearing officer conducting the removal hearing must state in writing the decision reached and the reasons upon which the decision is based.

Today, however, we need decide only if the facts set forth by the district court warrant the conclusion that the process given was inadequate and that such inadequacy was a violation of a clearly established constitutional right of which a reasonable person would have known. We hold in the affirmative.

B.

We also hold that the facts recited by the district court demonstrate that appellants violated Ms. Farley's substantive due process rights and that they are not entitled to qualified immunity for such conduct.

Again, we must first determine whether a substantive due process violation occurred before considering appellants' qualified immunity defense. *See* Conn, 526 U.S. at 290. Actions of a government official towards a citizen which "shock the conscience" offend substantive due process. *See* County of Sacramento v. Lewis, 523 U.S. 833, 846 (1998). This court recently set forth the following guidelines for determining whether such conduct is conscience-shocking:

In situations wherein the implicated state, county, or municipal agent(s) are afforded a reasonable opportunity to deliberate various alternatives prior to electing a course of action (such as, for example, most occasions whereby corrections officials ignore an inmate's serious medical needs), their actions will be deemed conscience-shocking if they were taken with "deliberate indifference" towards the plaintiff's federally protected rights. In contradistinction, in a rapidly evolving, fluid, and dangerous predicament which precludes the luxury of calm and reflective pre-response deliberation (such as, for example, a prison riot), public servants' reflexive actions "shock the conscience" only if they involved force employed "maliciously and sadistically for the very purpose of causing harm" rather than "in a good faith effort to maintain or restore discipline[.]"

****6** Claybrook v. Birchwell, 199 F.3d 350, 359 (6th Cir.2000) (quoting *Lewis*, 523 U.S. at 852-53) (citation omitted).

Since Brock and Grissom's conduct occurred after they had an opportunity to deliberate and consider how to proceed in Ms. Farley's case, they have violated Ms. Farley's substantive due process rights if such conduct was "deliberately indifferent" to her right to the immediate physical custody of her children. Such conduct would be conscience-shocking, thus violating Ms. Farley's substantive due process rights. We are satisfied that the conduct outlined above, as set forth by the district court, is sufficient to show that Brock and Grissom were deliberately indifferent, based on the analysis this court applied in *Claybrook*.

We now turn to Brock and Grissom's defense of qualified immunity as to Ms. Farley's substantive due process claim. The events in issue occurred in early 1995, but *Lewis* was not decided until 1998 and *Claybrook* in early 2000. Nevertheless, "[t]he fact that the law may have been unclear, or even hotly disputed, at the margins does not afford state actors immunity from suit where their actions violate the heartland of the constitutional guarantee, as that guarantee was understood at the time of the violation." *Stemler v. City of Florence*, 126 F.3d 856, 867 (6th Cir.1997). At the time of the events giving rise to this suit, the standard for finding a substantive due process violation was whether a defendant "engage[d] in arbitrary conduct intentionally designed to punish someone...." *Lewellen v. Metropolitan Gov't*, 34 F.3d 345, 351 (6th Cir.1994). In *Lewellen* we explained that "[w]hat seems to be required is an intentional infliction of injury, ... or some other governmental action that is arbitrary in the constitutional sense." *Id.* (internal quotations and citation omitted). The *Lewellen* standard must be applied in determining the issue of qualified immunity.

To better understand how the *Lewellen* standard compares to the deliberate indifference standard, it is helpful to compare the deliberate indifference standard to the malicious or sadistic standard currently used where public servants act without a reasonable opportunity to deliberate. In deciding on the correct standard to apply in *Claybrook*, we stated, "Thus, the more exacting 'malicious or sadistic' standard of proof, rather than the comparatively relaxed 'deliberate indifference' evidentiary criterion, controlled the 'shocks the conscience' substantive due process element." 199 F.3d at 360. It is evident that the *Lewellen* standard is far stronger than what we refer to in *Claybrook* as the comparatively relaxed deliberate indifference standard. [FN2] We need not determine whether the *Lewellen* standard reaches the level of the more exacting malicious or sadistic standard of proof, but it falls far closer to malicious or sadistic than it does to the deliberate indifference standard. Accordingly, Brock and Grissom's claim of qualified immunity is governed by a stronger standard than the more relaxed deliberate indifference standard which governs whether they are guilty of a constitutional violation.

FN2. We are aware that many of our older cases have stated that, "jail officials violate the due process rights of their detainees if they exhibit a deliberate indifference to the medical needs of the detainees *that is tantamount to an intent to punish.*" *Danese v. Asman*, 875 F.2d 1239, 1243 (6th Cir.1989) (emphasis added). *See also Molton v. City of Cleveland*, 839 F.2d 240, 243 (6th Cir.1988). Those cases all involved plaintiffs who were in the state's custody at the time of the alleged constitutional violations. In non-custodial situations, however, deliberate indifference is not necessarily synonymous with an intent to punish.

****7** On the facts before us, a genuine issue exists as to whether defendants' conduct constituted a substantive due process violation under *Lewellen*. The district court has set forth the following material facts: (1) Ms. Farley was coerced into signing the voluntary plan of action, having been made to feel she had no choice in the matter; (2) on several occasions both Brock and Grissom failed to comply with Ms. Farley's demands for her children's return and seemed to imply she had no such right; and (3) Brock and Grissom attempted to intimidate Ms. Farley to submit to the continued removal of her children, culminating in Brock's threat to take away

Ms. Farley's third child, Dustin, should she hire an attorney in an attempt to regain physical custody of Christina and David, Jr. If found to be true, such facts would support the conclusion that Brock and Grissom violated Ms. Farley's due process interest in the custody of her children, by engaging in "arbitrary conduct designed to punish" her. Therefore, summary judgment against Brock and Grissom was proper on their defense of qualified immunity as to Ms. Farley's claimed violation of her substantive due process rights.

* * *

For the foregoing reasons, we affirm the judgment of the district court.

JAMES L. RYAN, Circuit Judge. Concurs in the judgment only.

225 F.3d 658 (Table), 2000 WL 1033045 (6th Cir.(Tenn.)) Unpublished Disposition

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